



**The Comptroller General
of the United States**

Washington, D.C. 20548

Zelkowitz

Decision

Matter of: Kal Maintenance, Inc.
File: B-225355
Date: January 29, 1987

DIGEST

Air Force regulation that generally prohibits the use of performance and payment bonds in nonconstruction contracts does not preclude a requirement for such bonds where the contracting officer's determination to require them is based on the fact that (1) a contract for similar services at another installation was terminated for default and (2) the procuring activity historically has had difficulties with contractors performing similar services.

DECISION

Kal Maintenance, Inc. protests the terms of invitation for bids (IFB) No. F49642-87-B-0049, issued September 5, 1986 by the Washington Area Contracting Center, Andrews Air Force Base, Maryland, for military housing maintenance services. Kal Maintenance contends that the requirement for performance and payment bonds violates applicable Air Force regulations and unduly restricts competition.

We deny the protest.

The Air Force has postponed bid opening on this small business set-aside indefinitely pending the resolution of this protest. The agency contemplated the award of a contract having a base period of 9 months (from January 1 through September 30, 1987) with three 1-year options. The contractor is to provide all personnel, equipment, tools, material, supervision, and other items or services necessary to perform the required maintenance at Andrews Air Force Base and two other facilities located in Brandywine and Davidsonville, Maryland. The work includes maintenance management, service calls, and change of occupancy maintenance, which entails restoration of walls, appliances, floors, and windows. It also includes painting, preventive maintenance, and cleaning for 2,084 units of military family housing, recurring installed equipment maintenance, equipment facilities maintenance, and operation of a "U-Fix-It" store.

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At issue is whether the IFB's requirement that the successful contractor furnish a 100 percent performance bond and a 20 percent payment bond violates the applicable Air Force regulation governing the use of such bonds for other than construction contracts. This regulation, promulgated on January 6, 1986, provides in pertinent part:

"Performance and payment bonds shall not be required in other than construction contracts unless there is a documented history of prior default by contractor in the particular type of work to be required. Additionally, documentation of the inherent or recurring nature of such default, and the reasons therefore, must be prepared before a determination to use such bonds can be made."

Air Force Federal Acquisition Regulation Supplement § 28.107-1 (Jan. 6, 1986).

The procuring activity justified the inclusion of the bond requirements in this solicitation on two grounds. First, the activity referred to the default of a contractor performing this type of work at Wright Patterson Air Force Base, Ohio. Second, the activity referred to the problems it has historically encountered with contractors performing this type of service.

Kal Maintenance construes the regulation as constituting a clear prohibition against such bond requirements on nonconstruction contracts except where there is an actual history of prior default by contractors performing similar work. The protester argues that the one isolated instance of default at Wright Patterson Air Force Base and with prior contractors does the fact that the procuring activity has had difficulties not establish that default of these contracts is of an inherent or recurring nature. The protester thus maintains that the solicitation must be amended.

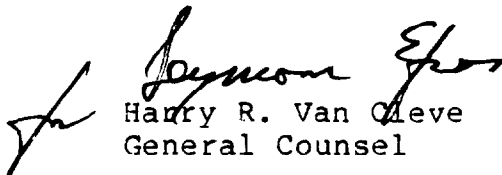
In a recent decision, we addressed identical concerns regarding the inclusion of bond requirements in a solicitation for multi-family housing maintenance at Hickam Air Force Base, Hawaii. DWS, Inc., B-224300, Dec. 18, 1986, 86-2 CPD ¶ _____. In that case, the Air Force justified the bond requirements by reference to the same instance of default at Wright Patterson, as it cited here, as well as to the poor performance by the incumbent and another prior contractor.

In the DWS decision, we construed the Air Force regulation as limiting the discretion afforded contracting officers under

the Federal Acquisition Regulation (FAR), 48 C.F.R. § 28.103-1 (1986), in determining whether to include bond requirements in a nonconstruction contract. Under the Air Force regulation, we stated, only after a showing of prior default could the contracting officer look at additional matters, and then for the sole purpose of deciding whether the default is of an inherent or recurring nature. In DWS, we found that the Air Force's justification satisfied this regulatory scheme, that is, that the single instance of default at Wright Patterson satisfied the requirement that a history of prior default in similar contracts be shown, and that the unsatisfactory performance under the current and predecessor contracts at Hickam demonstrated that the default was of an inherent or recurring nature.

For the same reasons, we find that the Air Force's inclusion of the bond requirements in the protested solicitation for services at Andrews is proper. As we stated in our prior decision, a single instance of default at Wright Patterson is sufficient to show a history of default, and the poor performance of prior contractors at Andrews demonstrates that such default may be of an inherent or recurring nature.

The protest is denied.


Harry R. Van Cleave
General Counsel